

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 ERNEST CARPENTER,

Case No. 2:20-cv-00800-GMN-NJK

4 Plaintiff,

SCREENING ORDER

5 v.

6 MINEV, et al.,

7 Defendants.

8 Plaintiff has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983, and
9 has filed an application to proceed *in forma pauperis*. (ECF Nos. 1-1, 4.) The matter of
10 the filing fee will be temporarily deferred. The Court now screens Plaintiff's civil rights
11 complaint under 28 U.S.C. § 1915A.

12 **I. SCREENING STANDARD**

13 Federal courts must conduct a preliminary screening in any case in which a
14 prisoner seeks redress from a governmental entity or officer or employee of a
15 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
16 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
17 upon which relief may be granted or seek monetary relief from a defendant who is immune
18 from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be
19 liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).
20 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
21 (1) the violation of a right secured by the Constitution or laws of the United States, and
22 (2) that the alleged violation was committed by a person acting under color of state law.
23 See *West v. Atkins*, 487 U.S. 42, 48 (1988).

24 In addition to the screening requirements under § 1915A, pursuant to the Prison
25 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the
26 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a
27 claim on which relief may be granted, or seeks monetary relief against a defendant who
28 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure

1 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil
2 Procedure 12(b)(6), and the court applies the same standard under § 1915 when
3 reviewing the adequacy of a complaint or an amended complaint. When a court
4 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
5 complaint with directions as to curing its deficiencies, unless it is clear from the face of
6 the complaint that the deficiencies could not be cured by amendment. See *Cato v. United*
7 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

8 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
9 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
10 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
11 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
12 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
13 allegations of material fact stated in the complaint, and the court construes them in the
14 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
15 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
16 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
17 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
18 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,
19 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
20 insufficient. *Id.*

21 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
22 that, because they are no more than mere conclusions, are not entitled to the assumption
23 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can
24 provide the framework of a complaint, they must be supported with factual allegations.”
25 *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity
26 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*
27 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
28 specific task that requires the reviewing court to draw on its judicial experience and

1 common sense.” *Id.*

2 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
3 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
4 includes claims based on legal conclusions that are untenable (e.g., claims against
5 defendants who are immune from suit or claims of infringement of a legal interest which
6 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
7 fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
8 *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

9 **II. SCREENING OF COMPLAINT**

10 In the complaint, Plaintiff sues multiple Defendants for events that took place while
11 Plaintiff was in NDOC custody. (ECF No. 1-1 at 1.) Plaintiff sues Defendants Dr. Minev,
12 Harold Wickham, and Dr. Bryan. (*Id.* at 1-2.) Plaintiff alleges two counts and seeks
13 declaratory, injunctive, and monetary relief. (*Id.* at 3-9.)

14 The complaint alleges the following: Plaintiff contracted Hepatitis C (“Hep-C”) in
15 2015. (*Id.* at 3.) Plaintiff was told that medical staff would monitor him via blood tests
16 every six months, but they would not provide him any other treatment. (*Id.*) Plaintiff has
17 since learned that a delay in treating Hep-C increases the chances that he will die of liver
18 failure, cancer, or chrihhosis of the liver. (*Id.* at 4.)

19 Based on these allegations, Plaintiff brings a claim of deliberate indifference to a
20 serious medical need under the Eighth Amendment as well as claims under the
21 Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, and the Rehabilitation Act
22 (“RA”), 29 U.S.C. § 794 or Section 5. The Court will consider these claims in turn.

23 **A. Deliberate Indifference to a Serious Medical Need**

24 The Eighth Amendment prohibits the imposition of cruel and unusual punishment
25 and “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity,
26 and decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the
27 Eighth Amendment when he acts with “deliberate indifference” to the serious medical
28 needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To establish an

1 Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the
2 deprivation was serious enough to constitute cruel and unusual punishment—and a
3 subjective standard—deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985 (9th
4 Cir. 2012).

5 To establish the first prong, “the plaintiff must show a serious medical need by
6 demonstrating that failure to treat a prisoner’s condition could result in further significant
7 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,
8 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference
9 prong, a plaintiff must show “(a) a purposeful act or failure to respond to a prisoner’s pain
10 or possible medical need and (b) harm caused by the indifference.” *Id.* “Indifference may
11 appear when prison officials deny, delay or intentionally interfere with medical treatment,
12 or it may be shown by the way in which prison physicians provide medical care.” *Id.*
13 (internal quotations omitted). When a prisoner alleges that delay of medical treatment
14 evinces deliberate indifference, the prisoner must show that the delay led to further injury.
15 See *Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985)
16 (holding that “mere delay of surgery, without more, is insufficient to state a claim of
17 deliberate medical indifference”).

18 The Court finds that Plaintiff fails to state a colorable claim of deliberate
19 indifference to a serious medical need. The complaint does not include any allegations
20 about any of the Defendants. As such, even assuming that Plaintiff had a serious medical
21 need, the allegations do not support that any of the Defendants were deliberately
22 indifferent to that need. As such, the Court dismisses this claim without prejudice and
23 with leave to amend. If Plaintiff chooses to file an amended complaint, he must allege
24 facts that demonstrate what each defendant did to violate his civil rights.

25 **B. ADA and RA**

26 Both the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, and the
27 Rehabilitation Act (“RA”), 29 U.S.C. § 794 or Section 5, apply in the prison context.
28 *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063 (9th Cir. 2010). Pursuant to the

1 ADA, “no qualified individual with a disability shall, by reason of such disability, be
2 excluded from participation in or be denied the benefits of the services, programs, or
3 activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C.
4 § 12132. Pursuant to the Rehabilitation Act, “[n]o otherwise qualified individual with a
5 disability in the United States . . . shall, solely by reason of her or his disability, be
6 excluded from the participation in, be denied the benefits of, or be subjected to
7 discrimination under any program or activity receiving Federal financial assistance.” 29
8 U.S.C. § 794(a). A prison inmate states a colorable claim under both the ADA and RA if
9 he alleges that he was “improperly excluded from participation in, and denied the benefits
10 of, a prison service, program, or activity on the basis of his physical handicap.” *Armstrong*
11 *v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997).

12 The Ninth Circuit has held that “the ADA prohibits discrimination because of
13 disability, not inadequate treatment for disability.” *Simmons v. Navajo County, Ariz.*, 609
14 F.3d 1011, 1022 (9th Cir. 2010). “Courts hold that allowing prisoners to utilize the ADA
15 and RA as causes of action for not receiving medical treatment is simply making ‘an end
16 run around the Eighth Amendment.’” *King v. Calderwood*, 2:13-cv-02080-GMN-PAL,
17 2015 WL 4937953, at *2 (D. Nev. Aug. 19, 2015) (citing *Deeds v. Bannister*, 3:11-cv-
18 00351-LRH-VPC, 2013 WL 1250343, at *5 (D. Nev. Jan. 8, 2013)).

19 The Court finds that Plaintiff fails to state a colorable claim under the ADA or the
20 RA. Plaintiff appears to allege that he is disabled due to having Hep-C and that he has
21 not received treatment for his Hep-C. But this amounts to a claim that Plaintiff has been
22 denied medical treatment for his disability, not that he has been discriminated against
23 because of his disability. As such, the allegations do not give rise to a claim under the
24 ADA or the RA, and the Court dismisses these claim with prejudice, as amendment would
25 be futile.

26 **III. LEAVE TO AMEND**

27 If Plaintiff chooses to file an amended complaint, he is advised that an amended
28 complaint supersedes (replaces) the original complaint and, thus, the amended complaint

1 must be complete in itself. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*,
2 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that “[t]he fact that a party was named in the
3 original complaint is irrelevant; an amended pleading supersedes the original”); see also
4 *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that for claims
5 dismissed with prejudice, a plaintiff is not required to reallege such claims in a subsequent
6 amended complaint to preserve them for appeal). Plaintiff’s amended complaint must
7 contain all claims, defendants, and factual allegations that Plaintiff wishes to pursue in
8 this lawsuit. Moreover, Plaintiff should file the amended complaint on this Court’s
9 approved prisoner civil rights form, and it must be entitled “First Amended Complaint.”

10 The Court notes that if Plaintiff chooses to file an amended complaint curing the
11 deficiencies, as outlined in this order, Plaintiff will file the amended complaint within 30
12 days from the date of entry of this order. If Plaintiff chooses not to file an amended
13 complaint curing the stated deficiencies, this action will be dismissed with prejudice for
14 failure to state a claim.

15 **IV. CONCLUSION**

16 For the foregoing reasons, it is ordered that a decision on the application to
17 proceed *in forma pauperis* (ECF No. 1) is deferred.

18 It is further ordered that the Clerk of the Court file Plaintiff’s complaint (ECF No. 1-
19 1) and send Plaintiff a courtesy copy of the complaint.

20 It is further ordered that Plaintiff claim of deliberate indifference to a serious
21 medical need is dismissed without prejudice and with leave to amend.

22 It is further ordered that Plaintiff’s claims under the ADA and the RA are dismissed
23 with prejudice, as amendment would be futile.

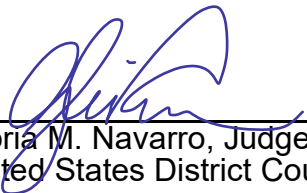
24 It is further ordered that, if Plaintiff chooses to file an amended complaint curing
25 the deficiencies of his complaint, as outlined in this order, Plaintiff will file the amended
26 complaint within 30 days from the date of entry of this order.

27 It is further ordered that the Clerk of the Court will send to Plaintiff the approved
28 form for filing a § 1983 complaint and instructions for the same. If Plaintiff chooses to file

1 an amended complaint, he should use the approved form and he will write the words "First
2 Amended" above the words "Civil Rights Complaint" in the caption.

3 It is further ordered that, if Plaintiff fails to file an amended complaint curing the
4 deficiencies outlined in this order, this action will be dismissed without prejudice.

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6 DATED THIS 11 day of May 2021.

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Gloria M. Navarro, Judge
United States District Court